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HOW MUCH DO WE REALLY KNOW ABOUT RACE AND JURIES? A REVIEW OF SOCIAL SCIENCE THEORY AND RESEARCH

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INTRODUCTION

The past decade has witnessed numerous high-profile criminal trials in which controversial verdicts have been attributed to race—the race of the defendant, the racial composition of a jury, an attorney “playing the race card,” and so on. A predominantly Black jury’s acquittal of O.J. Simpson and White jurors’ leniency in the police brutality cases of Rodney King and Amadou Diallo not only sparked public debate, but also led to rioting and violence. In the wake of trials such as these, many have questioned the viability of the American jury system.¹ More specific questions regarding the influence of race on jury decision making also emerge from this spate of well-publicized cases: How does a defendant’s race influence jurors’ perception and judgment? How does the racial composition of a jury affect its deliberations and final decision? Is the influence of race on jurors the same in all criminal trials?

Given the often polarizing nature of debates surrounding race, we believe that empirical analysis is essential to the effort to understand the relationship between race and criminal jury decision making. There are three main methodologies that researchers use in examining this relationship: (1) archival analysis of verdicts in actual cases; (2) post-trial interviews with jurors; and (3) mock juror experiments in which different versions of a trial summary are presented to research participants in a controlled setting. Each of these method-

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1. See, e.g., ANDREAS KAPARDIS, *PSYCHOLOGY AND LAW: A CRITICAL INTRODUCTION* (1997); RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS (Gerald A. Reynolds ed., 1996) [hereinafter *RACE AND THE CRIMINAL JUSTICE SYSTEM*].

ologies has strengths and weaknesses, and of course, specific studies of all three types vary in terms of the rigor of their design and the quality of their execution. In this Article, we will briefly review the use of archival analysis and juror interviews in the investigation of race before turning to a more thorough examination of experimental studies on the topic.

A. *Archival Analysis*

In many respects, archival analysis of actual trial outcomes is an ideal way to study the relationship between race and jury verdicts. Through the selection of a large enough number of cases from a given jurisdiction or period of time, researchers can use statistical analysis to identify specific factors that predict an increase or decrease in the likelihood of jury convictions. The difficulty inherent in this type of investigation is that criminal trials vary along a wide range of dimensions. In order to examine the relationship between a defendant's race and jury verdicts, for example, a researcher must account for an extraordinary number of nonracial variables, including type and severity of crime, quality of defendant's legal representation, defendant's socioeconomic status, and jury composition. To the extent that there are potentially confounding variables that the researchers are not aware of or are not able to measure and control for statistically, their conclusions regarding race are at best limited and at worst misleading.

Despite these obstacles, there are notable examples of rigorous archival analyses of race and jury decisions. For instance, David Baldus and his colleagues examined more than 2,000 capital murder cases from Georgia in the 1970s and found that defendants charged with killing a White victim were 4.3 times as likely to receive the death penalty as were defendants convicted of killing a Black victim.² In order to arrive at this conclusion, Baldus controlled for scores of nonracial variables and found that none of them could account for the observed pattern of racial discrimination, either alone or in combination with one another. Despite the carefully designed and controlled nature of these analyses, however, the Supreme Court dismissed this study as inconclusive in that "Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing deci-

2. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

sions or that race was a factor in [a] particular case.”³ Though we believe that the Baldus data are far more compelling than the Court recognized, it does remain true that even the most well-conceived of archival analyses can at best discover “a discrepancy that appears to *correlate* with race,”⁴ as opposed to demonstrating a causal relationship between race and jury decisions.

Of course, there are also examples of archival analyses of race that are not particularly objective or persuasive—just because research includes real cases does not mean it is well designed. In 1996, the Center for Equal Opportunity (“CEO”) published a report with a thesis asserting that the U.S. legal system is biased *in favor* of African-Americans.⁵ According to its authors, the central argument of this report—that Black jurors are unwilling to convict Black defendants—was based on an archival analysis of over 55,000 cases that revealed lower conviction rates for Black defendants than for Whites. Unlike the Baldus study, however, the CEO report failed to consider alternative explanations for the observed data. For example, the report never acknowledged the possibility that prosecutors are more likely to press forward with a weak case when the defendant is a minority, thereby providing juries with more opportunities to acquit Black defendants. Moreover, in a detailed exploration of the CEO data, Roger Parloff cast doubt on the reliability and significance of the reported racial difference in the first place.⁶ His investigation revealed that the sample of “over 55,000 actual cases” cited was actually a weighted sample of only 3,000 actual cases. In addition, the CEO analyses combined cases ending in dismissal and those ending in acquittal, creating a broader outcome category of “nonconvictions.” This means that their controversial claim of pervasive nullification among Black jurors was based on a few sensational anecdotes and a sample of only eighty actual jury acquittals.⁷

In sum, the advantage of archival analyses is that they examine actual trial outcomes and explore the relationships among variables that occur in real courtrooms. As the Baldus and CEO examples illustrate, however, this fact alone is not sufficient to ensure the methodological rigor of such investigations; even the most well-

3. *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987).

4. *Id.* at 312 (emphasis added).

5. See RACE AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 1.

6. Roger Parloff, *Speaking of Junk Science . . .*, AM. LAW., Jan./Feb. 1997, at 5.

7. *Id.* at 6.

designed archival analyses of race and jury outcomes face the interpretive difficulties of controlling for confounding variables and the limitations posed by a correlational research design.

B. Post-Trial Juror Interviews

Another common way in which researchers examine variables related to jury decision making is through interviews with jurors after a trial has ended. As with archival analysis, a strength of this methodology is that it involves the study of real trials and jurors. Locating and interviewing jurors requires a great deal of time and other resources, and as a result these studies tend to sample fewer cases than do archival analyses. But juror interviews have the added benefit of allowing researchers to examine more than just the final decision rendered by the jury. In interviews, for example, researchers can assess jurors' perceptions of specific witnesses, items of evidence, and the tone and content of their deliberations.

Juror interviews face many of the same methodological obstacles as archival analyses. It is difficult to compare the experiences or impressions of jurors across different "types" or "categories" of cases (e.g., trials with White vs. Black defendants, cases from different geographical regions or jurisdictions) due to the large number of confounding variables that may contribute to the observed differences. As with archival analysis, such comparisons are also only correlational in nature. As a result, juror interview studies of race in the courtroom have often focused on the easily identifiable variable of juror race by comparing the experiences of White and Black jurors (and, less frequently, jurors of other racial groups as well).⁸

Another limitation of the juror interview technique is that these investigations rely entirely on jurors' self-reported perceptions and their memory of their experiences. It is a well-documented psychological finding that people frequently lack the ability to identify accurately the factors that influence their judgment and behavior.⁹ Self-report data are particularly problematic when it comes to ques-

8. See, e.g., William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001); Nancy S. Marder, *Juries, Justice, and Multiculturalism*, 75 S. CAL. L. REV. 659 (2002).

9. See, e.g., Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

tions about the sensitive issue of race.¹⁰ In general, jurors may not be aware of the ways in which they are influenced by race, or they might intentionally provide misleading or incomplete answers to direct questions about racial issues.

The difficulties inherent in examining race in the courtroom using this methodology are illuminated by the inconsistent results reported in two recent juror interview studies. William Bowers and colleagues investigated the role of juror race in capital sentencing decisions by examining interviews with over 1,000 jurors from 340 trials across fourteen states.¹¹ Their findings indicated that in cases with a Black defendant and White victim, Black jurors were more likely than White jurors to perceive the jury as closed-minded, intolerant of disagreement, or in a hurry to make a decision; to report feeling like an outsider during the deliberations; and to express regret about the jury's ultimate sentencing decision. On the other hand, Nancy Marder's recent questionnaire study of jurors from twenty-six criminal juries in Los Angeles revealed no consistent racial differences in jurors' self-reported perceptions and experiences.¹² Marder reported that the racial diversity of the jury did not predict jurors' ratings of hostility during deliberations, their perception of the thoroughness of these deliberations, or their personal satisfaction with the outcome of the case.

In sum, whereas juror interview studies provide researchers with a wider array of empirical information than do strictly archival analyses, their results, too, are correlational and limited by concerns about confounding variables. Furthermore, jurors' answers to explicit questions about the controversial topic of race may be of dubious validity when it comes to identifying the influence of racial issues. Jurors who are willing to answer researchers' questions about racial issues may be unable or unwilling to provide accurate assessments of how their decisions were influenced by race. Questions regarding race may also lead to low response rates from potential interview participants, which is problematic if those jurors who refuse to be interviewed are the ones who were most affected by race during the course of the trial and deliberations.

10. See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. Bowers et al., *supra* note 8, at 259. This study also examined the actual sentencing decisions of each jury, and in this manner combined aspects of both archival analysis and post-trial juror interviews in its design.

12. See generally Marder, *supra* note 8, at 687-700.

C. Mock Juror Experiments

A third means of investigating the relationship between race and jury decision making uses the experimental methodology of social psychology. By examining the judgments of mock jurors in response to a trial simulation or condensed trial summary, researchers can control and isolate variables of interest, allowing for conclusions about causal relationships. For example, a researcher interested in the influence of a defendant's race on juror judgments could present participants with two versions of the same set of trial facts, one in which the defendant is identified as White and one in which the defendant is identified as Black.¹³ Assuming that juries have been randomly assigned to receive one of these two trial versions, any differences in their subsequent judgments of the case can be logically attributed to the influence of the defendant's race.

The strengths of the mock juror paradigm directly complement the weaknesses of analyses of real trials. In a well-designed experiment, the only differences between versions of the trial in question are those variables manipulated by the researcher. This eliminates potential confounds and allows researchers to examine more than the simple correlation between factors such as the defendant's race, jury racial composition, jury verdicts, and sentencing decisions. In a similar vein, the limitations of mock juror studies can be addressed by parallel investigations using real cases. Oft-cited weaknesses of mock juror research include the common use of college students as participants, the reliance on written trial summaries instead of live testimony, the failure to provide jurors with standard jury instructions, and the fact that the decisions rendered by mock juries have no real world consequences.¹⁴ The complementary nature of these different research designs—analysis of real trials and former jurors on the one hand, mock juror experiments on the other—suggests that any

13. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000) [hereinafter Sommers & Ellsworth, *Race in the Courtroom*]; Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Racial Prejudice against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001) [hereinafter Sommers & Ellsworth, *White Juror Bias*].

14. See, e.g., J. L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW. & PSYCHOL. REV. 103 (1979); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993).

investigation of the relationship between race and juries is best served by the use of multiple methodologies.

Nonetheless, legal scholarship about race and juries rarely turns to social science research for illumination. One explanation for this fact is that legal writers are often interested in the constitutional principles of racial representation rather than in its actual consequences. For example, it may be wrong to focus peremptory challenges on Blacks because Black citizens have an equal right to serve on juries, regardless of whether their presence would make any difference in the verdict or deliberations.¹⁵ It is also likely that many in legal circles are simply satisfied with the assumption that Black jurors and racially mixed juries are more lenient to Black defendants.¹⁶

There are two major law review articles that have attempted to review social science research on juries and the related empirical literature. Both arrived at the strong conclusion that the underrepresentation of Blacks on criminal juries creates a serious bias against Black defendants. In the earlier of the two, published in 1985, Sheri Lynn Johnson pointed out that although social science data have been criticized in some cases, such as *Brown v. Board of Education*,¹⁷ because the data were too sparse or too questionable to rely on, when it comes to racial bias in jury decision making, "the empirical evidence is . . . consistent and convincing."¹⁸

In 1993, Nancy King updated and extended Johnson's review of the empirical research on race and juries.¹⁹ Her synthesis of the conclusions of these studies was accurate: some have found evidence of racial bias, while others have not. Overall, though, King determined that the empirical evidence of racial bias was strong: "[W]henever a connection exists . . . white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors."²⁰

King also went on to identify the specific kinds of trials in which the effects of a juror's race would be most powerful, concluding that cases where racial issues were particularly salient would be the ones

15. See, e.g., *Powers v. Ohio*, 499 U.S. 400 (1991).

16. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); *Peters v. Kiff*, 407 U.S. 493 (1972).

17. 347 U.S. 483 (1954).

18. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1704 (1985).

19. King, *supra* note 14.

20. *Id.* at 85.

that would be most likely to elicit racial bias in White jurors: "For example, the studies would support a finding of a high probability of prejudice from jury discrimination if a black defendant could establish that he was convicted and sentenced to death for killing a white police officer by an all-white jury that heard racial epithets during trial and deliberations. . . ." ²¹ In other words, the more blatant the racial issues in the case, the higher the risk of racial bias in the jury. The Supreme Court has also endorsed the idea that the risk of racial prejudice is greatest in cases that are obviously racially charged. In *Powers v. Ohio*, the Court stated that doubts about jury neutrality would be aggravated "if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness. . . ." ²²

Although some legal scholars and judges may credit the evidence of social science research when describing the prevalence of racial bias or the type of cases where it is most likely to intrude, social scientists themselves are far more hesitant. Many of the experiments commonly cited with regard to the first issue, the prevalence of bias, are flawed. On the question of the circumstances under which bias is most likely, there are hardly any studies that directly address the matter. Reading just the *conclusions* of the published studies, one might infer that although there is not much research, what there is consistently demonstrates White juror bias, especially in racially charged cases. A close examination of the description of the methods and results, however, where the researchers describe what they actually did and what they actually found, often casts serious doubt on these conclusions. In many of the studies the number of participants is very small and the results are not statistically significant. Most striking, almost none of the research actually includes Black participants in the same studies as Whites, so the conclusion that Black jurors behave differently than White jurors remains largely unsubstantiated. In sum, the hypothesis that White racial prejudice plays an important role in jury decision making is certainly plausible, as is the hypothesis that this prejudice is likely to be exacerbated in cases that are racially charged, but the empirical evidence—for this latter proposition in particular—is actually weak.

21. *Id.* at 100 n.138.

22. *Powers v. Ohio*, 499 U.S. 409, 412 (1991).

D. Present Aims

The purpose of this Article is to present an updated and balanced review of the frequently overlooked, and sometimes oversimplified, social science literature on race and jury decision making. In Section I, we begin our review with an analysis of the most common type of social science research on race and juries: studies of the influence of a defendant's race on individual White mock jurors. Rather than portray these studies as uniform and conclusive as some writers have, it is our goal to contemplate the state of this literature more critically, summarizing its varied findings as well as highlighting apparent inconsistencies and methodological flaws. We will then place these empirical findings within a broader framework of psychological theories of racial bias in Section II, in an attempt to make sense of contradictory findings and to address the question of when race is and is not likely to influence juries.

Section III examines the smaller number of studies that have considered the judgments of non-White mock jurors, including the few that directly compared the influence of race on White and Black jurors. This review highlights the need for more investigations of Black jurors, as well as additional theory and research regarding the race-related attitudes and judgments of members of racial minority groups in general. Another limitation of social science studies of race in the courtroom is that most of this research focuses on the judgments of individual jurors. In Section IV, we review a handful of studies that examine decision making at the jury level, including a detailed exploration of one recent experiment that included actual jury pool members as participants and examined the social influence processes through which racial composition may affect deliberations. Finally, we offer concluding thoughts regarding the current state and future directions of social science research on race and juries, and reiterate the importance of utilizing multiple methods in any empirical investigation of the legal system.

I. INVESTIGATIONS OF DEFENDANT'S RACE AND WHITE JURORS

In light of recent media scrutiny of the role race plays in the legal system—not to mention the societal importance of the issue—the lack of social science research on race and jury decision making is surprising. Just three years ago, we reported that our own literature search for psychological research on race in the courtroom yielded fewer

than thirty studies published since 1990.²³ The vast majority of this research focused on the influence of a defendant's race on the judgments of individual mock jurors who were not asked to deliberate. Most of these studies used a similar experimental method, manipulating a defendant's race in a written trial summary or transcript given to mock jurors. In all but a handful of cases, these investigations were confined to the study of White jurors.²⁴

A. *Empirical Evidence of White Juror Bias*

While their results are not entirely consistent, several mock juror studies in the past two decades reveal evidence of White juror bias against Black defendants. In one such investigation, Klein and Creech showed White mock jurors a seven-minute video summary of a rape trial in which the defendant was either depicted as White or Black.²⁵ They found that individual jurors who watched the Black defendant version were more likely to believe he was guilty than jurors who saw the same trial video with a White defendant. Other researchers have obtained comparable results using various trial summaries, including Pfeifer's study of an assault case,²⁶ and Hymes and colleagues' rape study.²⁷ Similar biases have also been reported for Whites' sentencing decisions. Sweeney and Haney's statistical review of fourteen studies indicated that White mock jurors recommended longer sentences for Black than for White defendants.²⁸ A 1997 experiment by DeSantis and Kayson provided more recent evidence of biased sentencing recommendations in a burglary case.²⁹

Other studies have built on these findings by demonstrating that White juror bias is more likely in some trial situations than in others. James Johnson and colleagues, for example, identified the presence

23. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13.

24. The few exceptions to this tendency (i.e., studies that included non-White jurors) are reviewed in Section III of this Article.

25. See Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21 (1982).

26. Jeffrey E. Pfeifer, *Mock Juror Decision-Making and Modern Racism: An Examination of the Role of Task and Target Specificity on Judgmental Evaluations*, in DISSERTATION ABSTRACTS INTERNATIONAL 52 (1992).

27. Robert W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. SOC. PSYCHOL. 627 (1993).

28. Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992).

29. Andrea DeSantis & Wesley A. Kayson, *Defendants' Characteristics of Attractiveness, Race, and Sex and Sentencing Decisions*, 81 PSYCHOL. REP. 679 (1997).

of inadmissible evidence at trial as one such determining factor.³⁰ White mock jurors in this study were presented with the written summary of a bank robbery trial in which the defendant was either White or Black. In the baseline control version of the trial, the prosecution's case was circumstantial and ambiguous. In two experimental versions, the prosecution introduced a wiretap that suggested that the defendant had lied to police about his whereabouts at the time of the crime; this evidence was ruled either admissible or inadmissible. Results indicated that White mock jurors ignored this incriminating evidence when the defendant was White but not when he was Black.

Jeffrey Pfeifer and colleagues have suggested that judicial instructions also determine whether or not White jurors exhibit racial bias.³¹ In one such study, mock jurors were given a rape trial transcript in which the defendant's race, as well as the presence or absence of jury instructions was varied. In the absence of jury instructions, White mock jurors gave higher guilt ratings to the Black defendant than the White defendant. Other White jurors were given instructions that emphasized the importance of juror impartiality and the requirement that jurors be "free from sympathy or prejudice."³² These instructions eliminated any evidence of juror bias. Lynch and Haney came to similar conclusions regarding the influence of judicial instructions: the poorer their mock jurors' comprehension of judicial instructions, the more likely they were to demonstrate racial bias in a capital sentencing decision.³³

In addition to inadmissible evidence and judicial instructions, crime type has also been found to affect the likelihood of White juror bias. Sunnafrank and Fontes concluded that jurors have stereotypes about the types of crimes that people of different races tend to commit.³⁴ For example, they found that White jurors viewed white-

30. James D. Johnson et al., *Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893 (1995).

31. See, e.g., Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 CONTEMP. SOC. PSYCHOL. 6 (1992); Jeffrey E. Pfeifer & James R. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713 (1991).

32. Pfeifer & Ogloff, *supra* note 31, at 1718.

33. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000).

34. See Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. REL. 1 (1983). For further evidence of the influence of racial stereotypes on the information processing of jurors, see also Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing*

collar crimes—such as counterfeiting and embezzlement—as consistent with a stereotype of White criminals. On the other hand, more violent crimes such as assault and robbery were associated with a Black criminal stereotype. These data led Sunnafrank and Fontes to suggest that the stereotypicality of a crime influences whether or not jurors demonstrate racial bias. In a direct test of this hypothesis, Gordon found that White mock jurors were indeed more likely to demonstrate racial bias when a Black defendant committed a stereotypic (i.e., violent) crime.³⁵

B. *Studies Failing To Indicate White Juror Bias*

However, not all mock juror studies have found that White jurors demonstrate bias against Black defendants. Some researchers have arrived at the surprising conclusion that White jurors are biased *against* White defendants. In one such study, McGowen and King varied the race and socioeconomic status (“SES”) of the defendant in a written assault case.³⁶ The mock jurors, all of whom were White, recommended significantly longer sentences for the White defendant than the Black defendant. Unfortunately, the manipulation in this study confounded the variables of race and SES: the defendant was depicted as either a high-SES White or a low-SES Black. It is therefore impossible to separate the effects of defendant race and SES on mock jurors.

Poulson arrived at a similar result in an investigation of the insanity defense.³⁷ He presented mock jurors with an audiotaped summary of a murder trial in which the defendant’s race was conveyed using a photograph slide show. When their individual verdict preferences were assessed, White mock jurors were found to be more likely to acquit the Black defendant by reason of insanity than the White defendant. However, this study’s focus on the insanity defense makes it difficult to generalize these results to other, more typical

Process Models of Stereotype Use, 55 J. PERSONALITY & SOC. PSYCHOL. 726 (1988); Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871 (1987).

35. Randall A. Gordon, *The Effect of Strong Versus Weak Evidence on the Assessment of Race Stereotypic and Race Nonstereotypic Crimes*, 23 J. APPLIED SOC. PSYCHOL. 734 (1993).

36. Ramsey McGowen & Glen D. King, *Effects of Authoritarian, Anti-Authoritarian, and Egalitarian Legal Attitudes on Mock Juror and Jury Decisions*, 51 PSYCHOL. REP. 1067 (1982).

37. Ronald L. Poulson, *Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty But Mentally Ill (GBMI) Verdict Option*, 20 J. APPLIED SOC. PSYCHOL. 1596 (1990).

trials. To the extent that White jurors view mental illness or "insanity" as more consistent with their stereotype of Black versus White defendants, Poulson's finding of same-race bias becomes less surprising.

Still other researchers have concluded that a defendant's race has no reliable influence on White mock jurors. For example, Skolnick and Shaw presented Whites with a murder trial summary in which the defendant's race was varied.³⁸ They found that White mock jurors' guilt ratings were about the same for the White and Black defendants. Again, though, the generalizability of these findings is dubious. This study was conducted for a special journal issue devoted to the O.J. Simpson trial, and Skolnick and Shaw designed their trial materials to resemble the Simpson case. Furthermore, the study was run in Southern California while Simpson's civil trial was ongoing, and the authors cautioned against interpreting their results outside of this unique context.

In general, it is difficult to judge the persuasiveness of individual mock juror studies that have reported no evidence of White juror bias because their conclusions are based upon statistically nonsignificant, null results.³⁹ The most rigorous social science support for the claim that White jurors' individual judgments are not influenced by a defendant's race is provided by Mazzella and Feingold's meta-analysis of over eighty studies with more than 6,000 participants.⁴⁰ However, only ten of the studies included in this analysis (which also investigated the attractiveness, gender, and SES of defendants) actually examined the influence of race on jurors' guilt judgments, and only two of them were published after 1990. Once again, the authors themselves caution against overinterpretation of these results regarding defendant race, writing that "the finding of no general effects of race . . . was misleading because race apparently interacted complexly with other factors in influencing jurors' judgments of guilt."⁴¹

38. Paul Skolnick & Jerry I. Shaw, *The O. J. Simpson Criminal Trial Verdict: Racism or Status Shield?*, 53 J. SOC. ISSUES 503 (1997).

39. See, e.g., Mary V. McGuire & Gordon Bermant, *Individual and Group Decisions in Response to a Mock Trial: A Methodological Note*, 7 J. APPLIED SOC. PSYCHOL. 220 (1997); Stephanie Nickerson et al., *Racism in the Courtroom*, in PREJUDICE, DISCRIMINATION, AND RACISM 255 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

40. Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315 (1994).

41. *Id.* at 1333.

II. MAKING SENSE OF THE WHITE MOCK JUROR LITERATURE

Clearly no consensus has been reached regarding the influence of a defendant's race on White mock jurors. Some studies have suggested that White jurors are biased against Black defendants, others have yielded no evidence of bias, and a few researchers have found that White jurors are biased against White defendants. But substantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions. Of course, this conclusion is also consistent with the long history of discrimination suffered by Black defendants within the U.S. legal system.⁴² In an attempt to better understand the influence of a defendant's race on White jurors, as well as the specific circumstances in which White juror bias is and is not likely, we now turn to a brief review of psychological theories of modern racism and a discussion of how these perspectives might be applied to the study of juror decision making.

A. *Social Psychological Theories of Racism*

Over the past few decades, social psychologists have wrestled with two seemingly irreconcilable observations regarding Whites' racial attitudes and the pervasiveness of discrimination. On the one hand, contemporary Whites are less likely to endorse explicitly racist beliefs or to engage in acts of overt prejudice than were Whites of previous eras.⁴³ On the other hand, racial minorities continue to experience discrimination on a personal and an institutional level, both inside and outside of the laboratory.⁴⁴ Explaining this apparent disconnect between Whites' self-reported racial attitudes and the actual experiences of non-Whites is the central goal of many theories of modern racial bias.

Several psychologists have converged on the general conclusion that White racism still exists in contemporary America, but the nature

42. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); Sommers & Ellsworth, *White Juror Bias*, *supra* note 13, at 204.

43. See, e.g., John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 39, at 91.

44. See, e.g., Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546 (1980); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1990); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 39, at 61.

and manifestations of this bias have changed over time.⁴⁵ This “new” form of racism has been referred to by a variety of names, including modern racism, symbolic racism, subtle racism, and aversive racism. Terminology aside, these theories share a common assumption that most Whites are no longer as likely to demonstrate the overt, “red-necked” form of prejudice that was common in this country only a short time ago.⁴⁶ Because contemporary racial norms have shifted towards egalitarianism, the argument goes, explicit demonstration of racism is frowned upon in most circles. But Whites’ outward acceptance of a nonprejudiced value system has not led to the end of racial bias. Instead, theorists have suggested, many modern Whites express anti-Black sentiment through more subtle, symbolic, or “acceptable” means. Whites’ racial attitudes might manifest themselves through opposition to social policies designed to facilitate equality, such as affirmative action.⁴⁷ Whites may also express subtle prejudice through the endorsement of opinions such as “[b]lack[s] are getting too demanding in their push for equal rights.”⁴⁸

Moreover, theorists have offered predictions about the circumstances in which Whites are most likely to express bias. In their theory of aversive racism, Gaertner and Dovidio proposed that all Americans are aware of anti-Black stereotypes by virtue of their birth into a historically racist culture.⁴⁹ Still, many Whites embrace egalitarianism and make a conscious effort to behave in a nonprejudiced fashion. As long as this egalitarian motivation is active—which tends to occur when race is salient in a situation or when normative cues to avoid bias are strong—Whites can often successfully avoid prejudice. However, in some situations, the prejudicial attitudes and beliefs that linger in their consciousness emerge and influence behavior. When race is not salient or normative cues regarding prejudice are absent, Gaertner and Dovidio predict that Whites’ motivation to avoid prejudice will not be triggered. In such situations, Whites frequently let down their guard and demonstrate bias. Numerous empirical studies have provided support for this theory. In a series of laboratory experiments reported by Gaertner and Dovidio, Whites who

45. See, e.g., Gaertner & Dovidio, *supra* note 44, at 61; Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414 (1981); McConahay, *supra* note 43, at 91.

46. Gaertner & Dovidio, *supra* note 44, at 62.

47. Kinder & Sears, *supra* note 45, at 415.

48. McConahay, *supra* note 43, at 104.

49. Gaertner & Dovidio, *supra* note 44.

claimed to have an egalitarian motivation were nevertheless quicker to associate negative personality traits with Blacks and positive personality traits with Whites.⁵⁰ These results are consistent with findings other researchers have obtained using a variety of populations and methods,⁵¹ and they lead to the conclusion that even Whites who sincerely believe themselves to be nonprejudiced often harbor anti-Black sentiment that influences their behavior.

Experiments in more natural settings have also demonstrated the subtle nature of modern racial bias. In another study reported by Gaertner and Dovidio, experimenters pretended to be stranded motorists and phoned unsuspecting Whites to ask for assistance.⁵² Each "motorist," whose race was identifiable from his dialect, explained that he was using a pay phone because his car had broken down. The caller stated that he used his last coin to make this call but must have dialed the wrong number. He then asked if the participant would phone a tow truck on his behalf. After hearing the entire plea, White participants belonging to a liberal political party, who presumably had strong egalitarian beliefs, were more likely to help the Black than White caller. As the researchers explained, "[f]ailure to offer assistance to a black person once the necessity for help has been recognized would violate prescriptions for appropriate behavior and could be attributed to racial antipathy."⁵³ But a substantial number of participants hung up before hearing about the caller's need for assistance, and it was the Black motorist who suffered a disproportionate number of these premature hang-ups. Before the caller voiced his need for help and triggered normative pressures against hanging up, Whites discriminated against the Black motorist without concerns about appearing racist.

B. Applying Theory to the Courtroom

These theories about racism have obvious implications for the investigation of juror bias. More precisely, consideration of the situational antecedents of racial bias may lead to more specific hypotheses regarding the frequency and nature of White juror bias. For example, Gaertner and Dovidio concluded that Whites are less

50. *Id.* at 81.

51. *See, e.g.,* Devine, *supra* note 44; Greenwald & Banaji, *supra* note 10.

52. Gaertner & Dovidio, *supra* note 44, at 68.

53. *Id.* at 69.

likely to demonstrate racial bias when concerns about prejudice are salient.⁵⁴ In direct contrast to the assumptions of some legal scholars,⁵⁵ this observation has led us to propose the hypothesis that White jurors may be *less* influenced by a defendant's race when a trial is racially charged and they are reminded of concerns about racism.⁵⁶ There are many ways in which racial issues can be made salient at trial, including an obvious racial motivation for the crime in question, an attorney's attempt to "play the race card," or the presence of race-related pretrial publicity.

The results of several mock juror experiments are consistent with this hypothesis. In one study, Steven Fein and his colleagues examined the influence of pretrial publicity on mock jurors.⁵⁷ They found that individual White mock jurors' verdict preferences in a case with a Black defendant were influenced by inadmissible newspaper articles given to them before the trial transcript. But when mock jurors were also given information suggesting that the media's treatment of the defendant in this case was racially motivated, they no longer demonstrated this bias. Once concerns about racism were made salient in the experimental situation, White mock jurors rendered unbiased decisions based only on the admissible facts of the case. Pfeifer and Ogloff's finding that explicit instructions to avoid "sympathy or prejudice" eliminated the influence of the defendant's race on mock jurors can be interpreted in a similar manner.⁵⁸

Further support for the hypothesis that blatantly racial issues at trial make White juror bias less likely is provided by mock juror studies that have *failed* to find evidence of racism. Skolnick and Shaw, for example, found that White jurors were not influenced by a defendant's race when judging a trial summary that was similar to the racially charged O.J. Simpson case.⁵⁹ In our previous research, we also found no evidence of White juror bias when mock jurors were presented with racially charged written trial summaries.⁶⁰ These results have led us to propose that the intuitive assumption that

54. *Id.*

55. See, e.g., HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 5 (1993); King, *supra* note 14.

56. See Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1372.

57. Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors' Verdicts*, 53 J. SOC. ISSUES 487 (1997).

58. See Pfeifer & Ogloff, *supra* note 31, at 1718.

59. Skolnick & Shaw, *supra* note 38, at 510.

60. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1369.

racially charged trials are most likely to elicit White juror prejudice lacks empirical support, and may in fact be responsible for the apparent dearth of research into race in the courtroom; many of the studies that have used racially charged trial materials may have wound up in psychologists' file drawers with nonsignificant, null results.

Psychologists have suggested that racial bias among Whites is more likely when salient norms regarding racism are absent.⁶¹ In such situations, White perceivers often let their guard down, allowing their behavior to be influenced by anti-Black attitudes and prejudice. In light of this finding, we believe that White juror bias may be most likely when a trial is not racially charged and jurors' concerns about racism are not made salient. In other words, it is the non-race-salient, run-of-the-mill trial in which the defendant simply happens to be Black that might be most likely to elicit White juror bias.

In support of this prediction are previous studies that found evidence of juror bias by using trial materials that were not racially charged. Gray and Ashmore, for example, presented participants with a vehicular manslaughter trial in which racial issues were not salient.⁶² They found that White mock jurors were more punitive towards a Black defendant than a White defendant. Klein and Creech obtained similar results using a non-racially charged rape case.⁶³ Sweeney and Haney explicitly attributed the finding that White jurors demonstrate racial bias in sentencing decisions to the fact that such "decisions may provide fertile ground for more modern, subtle forms of racism to operate."⁶⁴

C. *Race-Salience as a Determinant of Bias*

Of course, a more rigorous test of whether salient racial issues at trial influence the likelihood of White juror bias requires varying racial content within a particular trial. In 2000, we conducted such an experiment by presenting 156 White mock jurors with the written summary of an interracial assault trial.⁶⁵ The defendant in this case, who was identified as either White or Black, was accused of knocking

61. See, e.g., Gaertner & Dovidio, *supra* note 44, at 62.

62. David B. Gray & Richard B. Ashmore, *Biasing Influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOL. REP. 727 (1976).

63. Klein & Creech, *supra* note 25.

64. Sweeney & Haney, *supra* note 28, at 191.

65. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1372.

down his girlfriend during a fight at a bar. In the race-salient version of the trial summary, he allegedly yelled at the victim, "You know better than to talk that way about a White (or Black) man in front of his friends," providing a racial context for the incident in question. In the non-race-salient version of the trial, this statement was modified to read, "You know better than to talk that way about a man in front of his friends."⁶⁶

The impact of this one-word race-salience manipulation was substantial. When racial issues were made salient in the case, individual White mock jurors were equally likely to vote to convict the White and Black defendant. When race was not salient, Whites gave higher guilt ratings and longer sentence recommendations to the Black defendant than to the White defendant. The proportion of White jurors voting to convict the Black defendant rose from 73% in the race-salient condition to 87% in the non-race-salient condition. The influence of the race-salience manipulation was also evident in other measures. In the non-race-salient condition, White jurors rated the prosecution's case against the Black defendant as stronger than its case against the White defendant; similarly, the defense of the Black defendant was rated as significantly weaker than the White defendant's defense.⁶⁷ These differences emerged even though the prosecution and defense cases were identical in the White and Black defendant versions of the trial. No such bias was observed in White jurors' judgments of the race-salient trial.

Furthermore, providing a racial context for the alleged assault influenced White jurors' perceptions of the defendant himself. In the non-race-salient condition, White jurors rated the Black defendant as more violent and aggressive than the White defendant. This pattern was reversed for positive personality characteristics: the White defendant was perceived to be more honest and moral than the Black defendant.⁶⁸ Compared to the White defendant, jurors were also more likely to agree that the Black defendant would be arrested for a similar crime in the future.⁶⁹ Once again, none of these differences emerged when racial issues in the trial were salient.

66. *Id.* at 1373.

67. *Id.*

68. *Id.*

69. *Id.*

In 2001, we replicated these results using a different trial.⁷⁰ In this study, White mock jurors were given the summary of an assault case involving high school basketball teammates who got into a fight in their locker room. The salience of racial issues in this trial was manipulated through the testimony of a defense witness. In the race-salient condition, an assistant coach testified that the defendant was one of only two White (or Black) players on the team, and that there had been racial tension in the locker room all season long. In the non-race-salient condition, this witness provided a race-neutral context for the altercation by testifying that the defendant had only one other close friend on the team, and that there was a good deal of social tension among the players. Once again, White mock jurors were not influenced by the defendant's race when racial issues were salient at trial, but in the trial that was not racially charged, jurors were more likely to vote to convict the Black defendant (90% of jurors voted to convict) than the White defendant (70% conviction rate).⁷¹

Taken together, these two studies provide support for the hypothesis that White juror bias is actually more likely to occur in trials *without* salient racial issues, where norms regarding race are weak—a conclusion that is consistent with theories of modern racism. But as the notoriety of O.J. Simpson's acquittal demonstrated, public debate regarding race and the jury system is by no means confined to the judgments of White jurors. Unfortunately, few psychologists have included non-White mock jurors in their investigations of race and jury decision making.⁷² And psychological theory is far less helpful when it comes to studying non-White jurors because most theories of modern racism also focus exclusively on the attitudes and judgments of Whites.

III. COMPARING THE JUDGMENTS OF WHITE AND BLACK JURORS

For many years, the consensus among mock jury researchers was that little if any consistent correlation existed between juror race and

70. Sommers & Ellsworth, *White Juror Bias*, *supra* note 13.

71. *Id.* at 217.

72. A fact that has been noted by, among others, King, *supra* note 14, at 75; Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISP. J. BEHAV. SCI. 275 (1983).

verdict preference.⁷³ But the studies upon which this conclusion was based were not likely to reveal between-race differences in juror decision making. They were, for the most part, intended as investigations of nonracial issues such as evidence comprehension, case complexity, jury size, and jury instructions, and most had too few non-White jurors to permit valid statistical comparisons. In fact, participant race was often assessed for demographic purposes only, and null results for race were usually reported as peripheral findings. Very few studies have directly addressed the between-race question germane to the research reviewed in the present Article: does a defendant's race influence White and Black jurors differently?⁷⁴ The handful of studies that varied a defendant's race in trials given to White and Black mock jurors have, in fact, yielded evidence of differences by juror race.

A. *Race of Juror Studies*

One study designed to compare the judgments of individual White and Black mock jurors was conducted by Foley and Chamblin.⁷⁵ Participants in this experiment listened to an audiotaped rape trial in which the race of the defendant was varied. Replicating the results of other studies, White jurors were more likely to vote to convict the Black defendant than the White defendant. Black jurors, on the other hand, were not influenced by the defendant's race. It is important to note, though, that of the 191 participants in this study, only 20 were Black, rendering it highly unlikely that statistically significant results could have been obtained for Black jurors.

Studies with a reasonably large number of Black participants have usually found that Black mock jurors are influenced by the race of a defendant. Ugwuegbu, for example, manipulated the defendant's

73. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 121–23 (1983); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 29 (1988).

74. Due, in large part, to the long-standing and well-documented nature of White-on-Black racism in American history, psychological research on prejudice traditionally has concerned itself with this specific instantiation of racial bias. Social science research on race and juries has followed this same lead, focusing mostly on White jurors' attitudes towards Black defendants, and, to a lesser extent, Black jurors' judgments. Therefore, in this section of the Article, we discuss the variable of juror race by comparing the decision making of White and Black jurors. To this point in time, relatively little research has examined the judgment processes of jurors of other racial minority groups.

75. Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOL. 47 (1982).

race and the strength of the evidence in a rape trial summary given to White and Black mock jurors.⁷⁶ He found that in the presence of marginal or strong prosecution evidence, both White and Black mock jurors demonstrated ingroup/outgroup bias, judging the same-race defendant more favorably than the other-race defendant. A direct comparison of White and Black jurors' decision making in this research is impossible, however, as Whites and Blacks participated in separate experiments.

A handful of studies have indicated that the race of a defendant affects Black jurors' judgments more than it affects Whites'. As described above, Skolnick and Shaw found no evidence of racial bias when they presented White mock jurors with a trial summary reminiscent of the O.J. Simpson case.⁷⁷ Black mock jurors, though, gave harsher guilt ratings and sentence recommendations to the White defendant than the Black defendant in this study. We have reported a similar result, demonstrating that the defendant's race in five racially charged trial summaries had a greater influence on Black jurors' judgments than on Whites'.⁷⁸ In their investigation of a vehicular homicide case, Abwender and Hough also found evidence of same-race leniency among Black, but not among White, mock jurors.⁷⁹

Finally, as detailed above, the CEO published a report in 1996 that took to the extreme this conclusion that race can have a greater influence on Black versus White jurors.⁸⁰ Beyond the methodological problems with this assertion,⁸¹ the results of other studies comparing White and Black jurors also fail to support the CEO's claim that Blacks *refuse* to convict Black defendants. In many of the mock juror studies reviewed above, Black jurors rated Black defendants as more likely to be guilty than not and demonstrated conviction rates as high as 80%.⁸² These data do not support the conclusion that widespread race-based jury nullification occurs among Black jurors, despite the suggestions of the CEO that such an epidemic currently exists or the

76. Denis C. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133 (1979).

77. See Skolnick & Shaw, *supra* note 38, at 510.

78. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1373.

79. David A. Abwender & Kenyatta Hough, *Interactive Effects of Characteristics of Defendant and Mock Juror on U.S. Participants' Judgment and Sentencing Recommendations*, 141 J. SOC. PSYCHOL. 603 (2001).

80. See RACE AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 1.

81. See Parloff, *supra* note 6.

82. See, e.g., Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1373.

proposition that such nullification should be encouraged in some cases.⁸³

B. *Exploring the Judgments of Black Jurors*

Unlike the study of White jurors, psychological theory about racism is not particularly helpful when it comes to understanding and predicting the judgments of Black jurors. Theories such as modern racism, symbolic racism, and aversive racism were devised specifically to explain the racial attitudes and behavior of White Americans.⁸⁴ Since Black mock jurors might not experience the same conflict between egalitarian norms and prejudicial beliefs that Whites do, the applicability of these theories to the study of Black jurors' decision making is questionable.

In fact, psychologists who have explored the racial attitudes of minority individuals suggest that White and Black Americans experience very different normative pressures regarding race. Nicole Shelton, for example, has argued that many Blacks are socialized in environments that are mistrustful of the egalitarian claims of White America.⁸⁵ This conclusion suggests that as a result of personal experiences with racial prejudice, Blacks may be less motivated than Whites to conceal their own ingroup/outgroup biases. In some instances, explicit ingroup preference among Blacks may even be encouraged as a means of combating institutional racism.⁸⁶ James Jones has proposed a similar hypothesis, predicting that racial preference is more "available to the consciousness" of Blacks and more likely to be expressed by Blacks than by Whites.⁸⁷ These conclusions indicate that concerns about avoiding racial preference may vary by race, and racial issues at trial might therefore influence White and Black jurors differently.

Support for this assertion is provided by the findings of our previous research, in which the salience of racial issues at trial determined the effect of the defendant's race on White, but not Black

83. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, in AFRICAN AMERICAN CLASSICS IN CRIMINOLOGY AND CRIMINAL JUSTICE 323 (Shaun L. Gabbidon & Helen T. Greene eds., 2002).

84. See sources cited *supra* note 44.

85. See generally J. Nicole Shelton, Blacks' Mistrust of Whites: Correlates and Impact on Social Interactions (unpublished manuscript, on file with the Chicago-Kent Law Review).

86. See Butler, *supra* note 83.

87. James M. Jones, *Whites are from Mars, O.J. is from Planet Hollywood*, in OFF WHITE: READINGS ON RACE, POWER, AND SOCIETY 251 n.3 (Michelle Fine et al. eds., 1997).

jurors.⁸⁸ Compared to their judgments of the White defendant, Black jurors in our study gave lower guilt ratings, shorter sentence recommendations, and more positive personality evaluations to the Black defendant, regardless of whether the trial was racially charged. This study also uncovered other racial differences. White and Black jurors were asked to respond to the following statement using a scale of 1 ("Strongly Disagree") to 7 ("Strongly Agree"): "The race of a defendant affects the treatment s/he receives in the legal system." Black participants' average response to this item was 6.9, practically at the maximum of the scale. This average response was significantly higher than the 4.7 average of Whites, and indicates Black jurors' skepticism about the fairness of the legal system. This is precisely the type of mistrust that Shelton, Jones, and others have suggested might lead Blacks to demonstrate racial preference.⁸⁹ Black mock jurors in our study also tended to rate the trial as racially charged whenever the defendant was Black, even when it was designed to be a non-race-salient case.⁹⁰ In other words, the mere fact that the defendant was Black seemed to be enough to make racial issues salient in the eyes of Black jurors.

In light of these findings, one explanation for same-race leniency among Black jurors is that they might sometimes attempt to "level the playing field" for Black defendants. In response to perceived racial inequities in the legal system, Black jurors may set the bar higher for the prosecution in cases with Black defendants. More precisely, the average Black juror might require a greater degree of certainty about guilt before voting to convict a Black defendant than a White defendant. Another possibility is that many Black jurors consciously adjust their definitions of "reasonable doubt," rendering them more likely to acquit when the defendant is Black.

But this same-race leniency effect can also be explained without inferring any intent to bring about racial justice. The fact that Black jurors—on average—become concerned about the fairness of the legal system when judging the trial of a Black defendant may lead to different interpretations of evidence when a defendant is Black and to different "story" constructions regarding what really happened in the

88. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1373.

89. See Jones, *supra* note 87; Shelton, *supra* note 85.

90. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1373.

incident in question.⁹¹ For example, Black jurors' perceptions of the evidence might be influenced by concerns regarding the fairness of the police investigation, the overzealousness of the prosecutor, or other potential sources of bias. In fact, Jones has argued that both a conscious motivation to combat bias and less deliberate perceptual tendencies contribute to same-race leniency among Black jurors: "It is probably true that the burden of proof is heavier when the evidence is viewed through counternarrative scenario lenses, and the defendant is a Black man."⁹²

It therefore appears as if White and Black jurors bring to the courtroom different concerns regarding racism. Many Whites, according to theories of modern racism, are motivated to avoid prejudice. As a result, White jurors may be more likely to demonstrate bias when a trial is not racially charged and they are not reminded of race-related norms. Black jurors, on the other hand, appear to be concerned about institutional bias in the legal system. Many Black jurors seem to be chronically aware of the possibility of bias in any case with a Black defendant, and this may lead to racial preference in the form of same-race leniency. Of course, it is important to recognize that the present analysis of Black jurors' decision making relies in large part upon speculation. Absent additional data collection using Black mock jurors—as well as more elaborated theories pertaining to the race-related judgments and behavior of non-Whites—it is difficult to assess these predictions regarding Black jurors. Furthermore, it is also worth noting that as little as we may know regarding the decision making processes of Black jurors, even fewer social science studies have examined jurors of other racial minority groups.

IV. RACE AND JURY DECISION MAKING

To this point, the studies reviewed in this Article have focused exclusively on individual mock juror judgments. But in real trials verdicts are rendered by deliberating groups, not individuals, and the generalizability of mock juror research is often questionable because it frequently ignores deliberation and group influence. Intuitively,

91. See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 90 (1992).

92. Jones, *supra* note 87, at 254.

however, the finding that individual judgments vary by juror race⁹³ leads to the jury-level hypothesis that racial composition can influence a jury's verdict. Specifically, if Black jurors are less likely than White jurors to convict Blacks, then the greater the percentage of Blacks on a jury, the less likely that jury should be to convict a Black defendant. Supreme Court rulings such as *Batson v. Kentucky*,⁹⁴ in which attorneys were prohibited from removing prospective jurors from a jury panel simply because of their race, suggest a tacit acceptance of the premise that racial composition can affect the verdict a jury reaches.⁹⁵ Jury reform movements have operated under a similar assumption in proposing various strategies for ensuring racially representative jury pools.⁹⁶ Even media reports about trials usually include the racial composition of the jury as if it had an effect on the final verdict. But mock jury studies are time-consuming, expensive, and logistically complicated, and for these and other reasons, intuitions about the influence of racial composition on juries have rarely been tested empirically.

A. *Published Research on Race and Mock Juries*

In one of the few experimental studies of race and deliberating mock juries, Bernard presented college student juries with the video of a simulated assault and battery trial.⁹⁷ Two versions of the trial were used, one with a White defendant and one with a Black defendant. Ten twelve-person juries of differing racial compositions viewed and then deliberated on the case. Results indicated that, across both versions of the trial, White jurors were more likely to vote to convict than Black jurors were, especially when the defendant was Black. In fact, the only jury to reach a unanimous guilty verdict in the

93. See, e.g., Abwender & Hough, *supra* note 79; Skolnick & Shaw, *supra* note 38; Ugwuegbu, *supra* note 76.

94. 476 U.S. 79 (1986).

95. This conclusion is one that the Court has also failed to endorse on other occasions. For example, in *Swain v. Alabama*, 380 U.S. 202 (1965), the Court ruled that race-based peremptory challenges (a practice which had prevented a single Black juror from serving on a criminal jury in Talladega County over the course of fifteen years) did not violate the rights of Black defendants. The Court majority held that such challenges were constitutional as long as they were not used in the attempt to deprive Black jurors of their right to jury service.

96. See, e.g., Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323 (1999).

97. Bernard, *supra* note 14, at 107.

study was also the only all-White jury to view the trial of a Black defendant.⁹⁸

These data support the intuition that the racial composition of a jury can significantly affect its final verdict. However, this study provides little insight into the process through which this influence occurs, relying instead on a demographic argument: since jurors of different races often view the same trial differently, racial composition can determine the predeliberation vote split and, eventually, the jury's verdict. This explanation would be consistent with Kalven and Zeisel's assertion that individual predeliberation votes are the best predictors of a jury's eventual verdict⁹⁹—a conclusion that has been supported by more recent findings as well.¹⁰⁰

However, it is also possible that the process of deliberating determines the influence of jury racial composition on jurors' judgments and final verdicts. For example, Bernard reported one finding concerning the influence of race on the deliberation process itself.¹⁰¹ Consistent with other studies that have observed a leniency shift after deliberations,¹⁰² he concluded that mock jurors' individual verdict preferences became more lenient after deliberations.¹⁰³ The exception to this tendency was found among jurors on all-White juries, whose verdict preferences were not affected at all by deliberating. It is worth noting, though, that this result was based on a very small sample size (only two all-White juries) and limited dependent measures, and Bernard himself offered no explanation for the finding.

Few researchers have more closely studied the influence that jury composition and deliberations have on the private attitudes of individual jurors, and those who have done so report contrasting results. Lipton examined the effects of deliberations on Anglo and Chicano jurors' judgments of a Chicano defendant.¹⁰⁴ He found that deliberations polarized jurors by race, rendering Anglo jurors even more likely to convict than they had been beforehand, and Chicano

98. *Id.* at 109.

99. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (1966).

100. See, e.g., Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 *LAW. & HUM. BEHAV.* 175 (1995); Sarah Tanford & Steven Penrod, *Jury Deliberations: Discussion Content and Influence Processes in Jury Decision Making*, 16 *J. APPLIED SOC. PSYCHOL.* 322 (1986).

101. Bernard, *supra* note 14, at 109.

102. See, e.g., Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 *J. PERSONALITY & SOC. PSYCHOL.* 687 (1988).

103. Bernard, *supra* note 14, at 109.

104. Lipton, *supra* note 72 ("Anglo" and "Chicano" are racial terms used by Lipton).

jurors even more likely to acquit. Norbert Kerr and colleagues, however, reported that the mere expectation of deliberating on a racially mixed jury led White and Black mock jurors to be more punitive towards a same-race defendant.¹⁰⁵ With these competing predictions regarding the relationship between race, deliberations, and juries, and with little data to speak directly to the issue, additional investigation of race and jury deliberations is clearly warranted.

B. Possible Deliberation Influence Processes

Informational social influence is the most common explanation for how a jury's racial composition might affect the deliberation process itself.¹⁰⁶ According to an informational explanation, the nature of the informational exchange in the jury room (i.e., the content of the discussion during deliberations) varies with the race of the jurors involved. For example, racial composition might influence the breadth of information considered by juries. Jurors of different races not only tend to enter deliberations with different verdict preferences, but they may also bring to the jury room different personal experiences, social perspectives, and concrete knowledge. Therefore, racially heterogeneous juries might be exposed to a wider range of viewpoints and interpretations than jurors on homogeneous juries. This prediction is consistent with Justice Thurgood Marshall's ruling in *Peters v. Kiff*, in which he suggested that group-based exclusion of jurors "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."¹⁰⁷ Though many legal scholars have alluded to this informational hypothesis,¹⁰⁸ little to no empirical evidence actually exists in support of it.

It is also possible that jury composition affects deliberations through non-informational means. A jury's racial composition may, for example, trigger normative pressures regarding race by activating jurors' motivations to avoid prejudice. This is a possibility that legal scholars and judges have not often discussed, but it is consistent with psychological research and theory regarding the influence of race on social perception. For example, Kerr and colleagues provide evi-

105. Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 LAW & HUM. BEHAV. 545 (1995).

106. See, e.g., Marder, *supra* note 8, at 678, 680.

107. 407 U.S. 493, 503-04 (1972).

108. See, e.g., Marder, *supra* note 8, at 678 n.97.

dence for the non-informational influence of race in the courtroom through their finding that the mere expectation of deliberating on a racially heterogeneous jury affected mock jurors' perceptions of blameworthiness.¹⁰⁹ At the very least, this result suggests that jurors may censor their public attitudes when they are on racially mixed juries, though jurors' private evaluations of the evidence might also be affected by motivational pressures.

Essentially, the knowledge that one is going to deliberate with jurors of a different race might be yet another way in which racial issues can be made salient for White jurors at trial. In our previous research,¹¹⁰ White jurors' ratings of the evidence and of the Black defendant's disposition changed significantly when race became a salient trial issue. Whites rated the prosecution's case as weaker, the defense's case as stronger, and the Black defendant's personality as less threatening when the trial was racially charged. The knowledge that they will eventually discuss the case with Black jurors might have a similar effect on the race-related motivations of White jurors, activating their concerns about prejudice and influencing their processing and interpretation of the evidence.

Furthermore, membership on a racially heterogeneous jury might also influence White jurors' behavior during deliberations. As detailed above, one basis for the hypothesis that racially heterogeneous juries cover a wider range of information while deliberating is that Black jurors tend to raise issues that White jurors do not. But it is also possible that White jurors are more likely to think about certain issues, and to raise them, when they are on diverse juries. If the presence of Black jurors on the jury makes race a salient concern for Whites, then White jurors may be more likely to bring up issues such as racial profiling when they are on racially mixed juries. Given that minorities (in terms of demographics as well as opinion) tend to participate less than majority individuals during group discussions, such a motivational explanation could prove useful in accounting for the influence of racial composition on jury deliberations and verdicts.¹¹¹

109. See Kerr et al., *supra* note 105.

110. See Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13; Sommers & Ellsworth, *White Juror Bias*, *supra* note 13.

111. See, e.g., Catherine Kirchmeyer, *Multicultural Task Groups: An Account of the Low Contribution Level of Minorities*, 24 SMALL GROUP RES. 127 (1993); Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987).

C. *Future Directions*

The vast majority of social science investigations of race and the courtroom have focused on the judgments of individual mock jurors. Although this work comprises an important aspect of research on race and juries, additional mock *jury* studies are necessary in order to answer questions regarding the influence of race-salience at the group level, or the processes by which racial composition may affect deliberations. In concluding the present review of the social science literature on race in the courtroom, we will end with one such mock jury study that is unique in terms of its high level of realism and its focus on the variables of race-salience and jury racial composition.

In this 2002 experiment, Sommers recruited jury-eligible citizens as well as jury pool members from Washtenaw County, Michigan to serve as participants.¹¹² Mock jurors were all shown the same videotaped summary of a real rape trial with a Black defendant. In order to create a more realistic simulation of the jury experience than is common in psychological studies, participants completed a written voir dire questionnaire before the trial video, received State of Michigan jury instructions afterwards, and then deliberated on the case as members of six-person juries.¹¹³ These deliberations were videotaped for later analysis. Other dependent measures in the study were assessed via written questionnaire, including individual jurors' predeliberation and postdeliberation verdict preferences; interpretations of and memory for the facts of the case; evaluations of attorneys, witnesses, and the defendant; and perceptions of the deliberation process and performance of fellow jurors.

Although all mock juries watched the same trial video in this study, there were two variables manipulated in the experimental sessions. First, jurors received one of two different versions of the voir dire questionnaire. Some jurors were asked about their racial attitudes and general perceptions of racial bias in the legal system, whereas other jurors received a questionnaire that made no explicit reference to race or racial bias. This manipulation was intended to test whether race-relevant voir dire questions are yet another way in

112. Samuel R. Sommers, *Race and Juries: The Effects of Race-Salience and Racial Composition on Individual and Group Decision-Making* (2002) (unpublished Ph.D. dissertation, University of Michigan) (on file with the Chicago-Kent Law Review).

113. Six-person juries were used instead of twelve-person juries because of practical constraints, including the number of jury pool members available for the study and the physical size and setup of the available deliberation room.

which White jurors' concerns about racial bias can be made salient. For example, one question in the race-relevant voir dire questionnaire read: "The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?" Another race-relevant question read: "In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?"¹¹⁴

The purpose of these race-relevant voir dire questions was not to identify jurors who were likely to exhibit racial bias in their judgments; as detailed in the introduction to this Article, people are frequently unable or unwilling to accurately predict how race will affect their judgments.¹¹⁵ Rather, these race-relevant voir dire questions were designed to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system. Results indicated that the race-relevant voir dire questions did influence jurors' subsequent perceptions of the trial. Specifically, both White and Black mock jurors were less likely to vote to convict the Black defendant after experiencing a race-relevant voir dire.¹¹⁶ These findings demonstrate yet one more way in which jurors' concerns about race can be made salient at trial, and confirm our earlier findings that when race is made salient to Whites, they are less likely to be influenced by it.¹¹⁷

The second variable manipulated in this experiment was the racial composition of the mock juries. In order to examine the influence of jury composition on the deliberation process, half of the mock juries were all-White, and the other half were racially mixed, with four White and two Black members.¹¹⁸ Sommers examined the influence of racial composition by comparing the trial judgments of individual jurors on the racially homogeneous and heterogeneous juries, and by examining the content and tone of the videotaped deliberations. These analyses served as a rare empirical test of the prediction that information exchange during deliberation differs

114. Sommers, *supra* note 112, at 63.

115. See Nisbett & Wilson, *supra* note 9.

116. Sommers, *supra* note 112, at 71.

117. Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 13, at 1373; Sommers & Ellsworth, *White Juror Bias*, *supra* note 13, at 217.

118. Of course, it would also be interesting and useful to examine the decision making of predominantly Black juries or juries with equal numbers of White and Black jurors. However, the demographics of the Washtenaw County, Michigan jury pool rendered it practically impossible to include in this investigation a substantial number of mock juries with more than two Black jurors.

depending on the composition of a jury—a hypothesis that has been proposed but not tested by judges and legal scholars, who have typically relied on the assumption that during deliberations, “people of different backgrounds contribute different perspectives in ways that are unknowable but nevertheless significant.”¹¹⁹ The design of this experiment also allowed for the examination of motivational or non-informational influences of jury composition on jurors.

Analysis of the videotaped deliberations indicated that the racial composition of the jury influenced the content and scope of the discussions. Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial (e.g., physical evidence that was not presented, witnesses who did not testify). Racially mixed juries were also more likely to discuss racial issues such as racial profiling during deliberations, and more often than not, Whites on these heterogeneous juries were the jurors who raised these issues.¹²⁰ To our knowledge, these findings are the first in the mock jury literature to provide empirical support for the assumption that jury diversity leads to a greater breadth of perspectives discussed during deliberations.¹²¹

The Sommers study also demonstrated that jury composition could have a non-informational influence on jurors. Immediately after watching the trial video and hearing jury instructions, individual mock jurors were asked to indicate their predeliberation verdict preference by circling either “Not Guilty” or “Guilty” on an anonymous, written questionnaire. Analysis of these responses indicated that even before deliberations, White jurors on racially mixed juries were less likely to vote to convict the Black defendant than White jurors on all-White juries.¹²² In other words, simply knowing that they would be discussing the case with a racially heterogeneous group was sufficient to influence jurors’ private judgments. This result suggests that membership on a racially mixed jury might be another way in which White jurors’ motivations to avoid prejudice are activated, thereby affecting subsequent trial judgments.

This conclusion is also supported by Sommers’ findings regarding White jurors’ willingness to discuss the possibility of racial bias (with

119. Marder, *supra* note 8, at 668.

120. Sommers, *supra* note 112, at 108.

121. See, e.g., *Peters v. Kiff*, 407 U.S. 493 (1972); Marder, *supra* note 8, at 678, 680.

122. Sommers, *supra* note 112, at 71–74.

regard to the case in question or the criminal justice system in general) during deliberations. Data indicated that White jurors on racially mixed juries were more amenable to discussion of such racial issues, perhaps because they started thinking about racial bias and their own racial attitudes as soon as they saw the racial composition of their jury. On the other hand, when race or the possibility of racial bias came up during the deliberations of all-White juries, other jurors were likely to change the subject or attempt to dismiss these concerns as irrelevant.¹²³ Absent salient normative cues regarding racism, jurors on all-White juries seemed surprised by a fellow juror's mention of race and relatively unmotivated and unwilling to discuss the topic during deliberations. Taken together, the results of this study demonstrate the potential for racial composition to influence a jury's deliberations and final verdict through both informational and motivational means.

CONCLUDING THOUGHTS

It is our hope that this Article not only illustrates the usefulness of social science methodology for drawing causal conclusions about race and juries, but also places these experiments within a more theoretical framework. In doing so, we seek to correct many of the misconceptions that judges and legal writers may have held regarding the number of these studies and the uniformity of their findings. One conclusion of our review of this literature is that there is currently less there than meets the eye. For instance, many of the studies commonly cited include only White participants. These studies can tell us something about whether White jurors are affected by a defendant's race, but nothing about whether Whites and Blacks behave differently. Our review suggests that White jurors are indeed influenced by a defendant's race, but this influence is not consistent across cases. Contrary to common assumption,¹²⁴ obviously racially charged trials may not be the ones in which racial bias is most likely. Psychological research and theory suggest that White juror bias may be a more serious concern in run-of-the-mill cases when racial issues are not salient and White jurors are not alerted to the need to guard against prejudice. In the few studies that have included enough Black jurors to allow for meaningful statistical comparisons by juror race, a

123. *Id.* at 109.

124. *See, e.g.,* Powers v. Ohio, 499 U.S. 400 (1991); King, *supra* note 14, at 100 n.138.

different pattern emerges. Black mock jurors seem to be influenced by a defendant's race regardless of the salience of racial issues at trial, suggesting that additional theory and research is needed in order to better predict the motivations and judgments of minority jurors.

The present Article also examines the intuition that the racial composition of a jury can affect its deliberations and final verdict. Despite frequent suggestions that diverse juries lead to a diversity of perspectives during deliberations,¹²⁵ very little research has actually tested this hypothesis until a recent study conducted by one of the present authors.¹²⁶ The results of this experiment, which used actual jury pool members as participants, indicate that the effects of racial heterogeneity on jury deliberations are not limited to the addition of the contributions and perspectives of minority jurors. To the contrary, this experiment demonstrates that racial diversity has a significant effect on the judgments of White jurors and on their contributions to deliberations. Before deliberations even began in this study, White jurors' private opinions about the case were influenced by the racial composition of the jury. In this sense, membership on a racially mixed jury seems to be yet another way in which concerns about race can be made salient for White jurors during a trial. Furthermore, the actual content of the deliberations in this study also varied based on jury composition, as racially mixed juries had longer, more thorough deliberations than all-White juries. This result also was not solely attributable to the behavior of Black jurors, as White jurors on heterogeneous juries mentioned more factual information and were more amenable to the discussion of racially charged topics than were Whites on homogeneous juries. These findings suggest fruitful future directions for investigating the processes through which race influences jury deliberations, and also demonstrate the extent to which it is possible to create a realistic jury simulation in a controlled, experimental setting.

We began this Article with a series of questions about race and jury decisions that legal scholars and social scientists have attempted to answer through a variety of empirical methods. Of course, criminal trials are complex enterprises consisting of myriad variables, and the answers to such questions are rarely simple or definitive. For any particular case, few researchers would dare claim that they could predict exactly how and to what extent race will influence the final

125. See, e.g., *Peters*, 407 U.S. at 503; see also sources cited *supra* note 8.

126. Sommers, *supra* note 112.

verdict. But through archival analysis, juror interviews, and mock jury experiments—and we would argue for the importance of utilizing all of these methods in answering any research question—a better general understanding is emerging of the ways in which race can affect juries and the circumstances under which such influence is likely. And given the limitations of other available methodologies, both in terms of the breadth of research questions they can address and the types of conclusions they can reach, we have every reason to believe that, in the future, social science research will continue to be an essential component of the investigation of race and criminal juries.